Supreme Court, U.S.
FILED
JAN 28 2014
OFFICE OF THE CLERK

Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF FOR THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* SUPPORTING THE PRIVATE PARTIES

WILLIAM M. JAY
SHAUNEEN GARRAHAN
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001

JOHN A. MARRELLA
KNIGHTS OF COLUMBUS
One Columbus Plaza
New Haven, CT 06510

KEVIN P. MARTIN
Counsel of Record
JOSEPH P. ROCKERS
TODD MARABELLA
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
kmartin@goodwinprocter.com
(617) 570-1000

January 28, 2014

Counsel for Amicus Curiae

TABLE OF CONTENTS

PAGE

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 3

I. The Knights Of Columbus Conducts Its Religious, Fraternal, And Charitable Activities In Accordance With The Catholic Faith 3

II. The Mandate. 6

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. Corporations May Pursue Free Exercise Claims Under RFRA. 11

II. There Are Demonstrable Guideposts To Evaluate Whether A Corporation Is Engaged In Sincere Religious Exercise 21

III. The Government's Position Would Have Profound Implications On The Future Of Free Exercise Jurisprudence. 26

CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

CASES

A. P. Smith Mfg. Co. v. *Barlow*,
98 A.2d 581 (N.J. 1953).....20

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993).....11

Conestoga Wood Specialties Corp. v. *Sebelius*,
724 F.3d 377 (3d Cir. 2013).....13

Employment Div., Dept. of Human Resources of Ore. v. *Smith*,
494 U.S. 872 (1990).....11

First Nat'l Bank of Boston v. *Bellotti*,
435 U.S. 765 (1978).....20

Gallagher v. *Crown Kosher Super Mkt. of Mass., Inc.*,
366 U.S. 617 (1961).....16

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. *EEOC*,
132 S. Ct. 694 (2012).....16

Korte v. *Sebelius*,
735 F.3d 654 (7th Cir. 2013).....15, 18, 28

McGowan v. *Maryland*,
366 U.S. 420 (1961).....16

Moussazadeh v. *Tex. Dep't of Crim. Justice*,
703 F.3d 781 (5th Cir. 2012).....24

Patrick v. *LeFevre*,
745 F.2d 153 (2d Cir. 1984) 22

Pennhurst State Sch. & Hosp. v. *Halderman*,
451 U.S. 1 (1981) 25

Roberts v. *U.S. Jaycees*,
468 U.S. 609 (1984) 15

Rowland v. *Cal. Men's Colony, Unit II Men's Advisory Council*,
506 U.S. 194 (1993) 14

Shaliehsabou v. *Hebrew Home of Greater Wash., Inc.*,
363 F.3d 299 (4th Cir. 2004) 23

Sherbert v. *Verner*,
374 U.S. 398 (1963) 14

Stormans, Inc. v. *Selecky*,
586 F.3d 1109 (9th Cir. 2009) 18

Theodora Holding Corp. v. *Henderson*,
257 A.2d 398 (Del. Ch. 1969) 20

Tyndale House Publishers, Inc. v. *Sebelius*,
904 F. Supp. 2d 106 (D.D.C. 2012) 18, 23

United States v. *Manneh*,
645 F. Supp. 2d 98 (E.D.N.Y. 2008) 25

United States v. *Middleton*,
231 F.3d 1207 (9th Cir. 2000) 14

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 14

STATUTES

1 U.S.C. § 1 ..... 12, 13, 14

15 U.S.C. § 1692a 12

18 U.S.C. § 1030 14

26 U.S.C. § 501 18

26 U.S.C. § 4980H 8

26 U.S.C. § 5000A 8

42 U.S.C. § 300gg 7

42 U.S.C. § 2000bb ..... *passim*

42 U.S.C. § 2000e 12

46 U.S.C. § 104 12

RULES

45 C.F.R. § 147 ..... 7, 8, 9

OTHER AUTHORITIES

1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 139 (perm. ed. rev. vol. 2010) 23

CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2258, 2270–75, 2284–87, 2366, 2370, 2399 (2d ed. 1997) 5, 6

Charter of the Knights of Columbus § 2 (2013) ... 5, 12

Health Resources and Services Administration, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womens_guidelines (last visited Jan. 21, 2014) 7

Knights of Columbus, *History*, http://www.kofc.org/un/en/about/history/index.html (last visited Jan. 21, 2014) 3

Letter from Carl A. Anderson, Supreme Knight of Knights of Columbus, to Centers for Medicare & Medicaid Services, Department of Health and Human Services, Notice of Proposed Rulemaking on Coverage of Certain Preventive Services Under the Affordable Care Act (Apr. 6, 2013), *available at* http://www.kofc.org/mandate. 2

Mission Statement of Belmont Abbey College, http://belmontabbeycollege.edu/about/mission-vision-2/ (last visited Jan. 27, 2014) 19

Pope John Paul II, *Evangelium Vitae* ¶¶ 58–62 (1995), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_ 25031995 5

Pope Paul VI, *Humanae Vitae* (1968), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_e 5

The Pope Praises the Integrity and Loyalty of the Knights of Columbus, PRESS OFFICE – VATICAN INFORMATION SERVICE (Oct. 10, 2013), http://visnews-en.blogspot.com/2013/10/the-pope-praises-integrity-and-loyalty.html (last visited Jan. 21, 2014) 4

Mark L. Rienzi, *God & the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59 (2013) 17, 20, 24

Steven J. Willis, *Corporations, Taxes, & Religion: The Hobby Lobby & Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1 (2013) 17, 22

Zondervan Mission, Values and Publishing Philosophy, http://zondervan.com/about/mission (last visited Jan. 21, 2014) 20

INTEREST OF THE *AMICUS CURIAE*

The Knights of Columbus[1] is a well-known American institution, founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, a Catholic priest. It was Father McGivney's intent to establish a fraternal society for Catholic men to confirm them in their Catholic faith and to provide an organization through which they could live out the teachings of the Church in their everyday lives. Today, more than 130 years later, the Knights of Columbus remains a thoroughly Catholic organization, committed to its core principles of charity, unity, and fraternity. The organization's Catholic mission and identity are reflected in virtually every aspect of its operations. For example, the Knights of Columbus sponsors numerous events and activities that support the Catholic Church, promote its teachings, and encourage the faithful. As part of its religiously-motivated mission, the Knights of Columbus raises and donates millions of dollars to charitable causes in the United States and abroad, and every year its members contribute millions of volunteer hours to charitable causes. Last year alone, for example, the Knights of Columbus donated $167.5 million and more than 70 million volunteer hours. But the mission of the Knights of Columbus is not limited to religious and charitable endeavors. To accomplish its religious mission, the Knights of Columbus employs nearly

---

[1] The Knights of Columbus states that (i) no counsel for a party authored this brief in whole or in part, and (ii) neither the parties, nor their counsel, nor anyone except the Knights of Columbus and its counsel financially contributed to preparing this brief. All parties have consented to the filing of this brief.

1,000 persons and offers these employees a generous non-contributory group health plan. Consistent with Catholic doctrine, this health plan excludes coverage for contraception, abortion-inducing drugs and devices, surgical abortion, and sterilization.

Now comes the Patient Protection and Affordable Care Act (the "Act"). Subject to numerous exemptions, the contraceptive-coverage mandate promulgated pursuant to the Act (the "Mandate") forces many incorporated entities, including thousands of businesses owned by members of the Knights of Columbus, to provide coverage for contraceptives and abortion to their employees. The overarching rationale offered by the government in support of the Mandate's constitutionality—that only individuals and houses of worship, and not any other entities, possess rights under the Free Exercise Clause of the First Amendment or under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*—poses grave risks to all incorporated entities that, in whole or part, pursue a religious mission.

The Knights of Columbus recognizes that "religious freedom is both a natural right and basic civil right guaranteed by the First Amendment of the Constitution" and has therefore worked diligently over the last 125 years "to defend religious freedom for Catholics and all Americans." See Letter from Carl A. Anderson, Supreme Knight of Knights of Columbus, to Centers for Medicare & Medicaid Services, Department of Health and Human Services, Notice of Proposed Rulemaking on Coverage of Certain Preventive Services Under the Affordable Care Act (Apr. 6, 2013), *available at*

http://www.kofc.org/mandate. The Knights of Columbus therefore submits this brief to assist the Court in its consideration of the government's aggressive claim that certain incorporated entities should lack any free exercise rights.

STATEMENT

I. The Knights Of Columbus Conducts Its Religious, Fraternal, And Charitable Activities In Accordance With The Catholic Faith.

1. The Knights of Columbus is a Connecticut corporation founded in 1882 to unite men of Catholic faith and to render financial aid to members and their families. It is the world's largest Catholic fraternal service organization, with more than 1.8 million members in the United States, Canada, Mexico, the Philippines, Poland, and other countries. The Knights of Columbus operates through an active system of approximately 14,000 local and state councils that conduct extensive charitable, educational, religious, and social programs.

The Catholic identity of the Knights of Columbus is interwoven into the very fabric of the organization, beginning with its name. See Knights of Columbus, *History*, http://www.kofc.org/un/en/about/history/index.html (last visited Jan. 21, 2014) ("As a symbol that allegiance to their country did not conflict with allegiance to their faith, the organization's members took as their patron Christopher Columbus—recognized as a Catholic and celebrated as the discoverer of America."). Indeed, such is the organization's devotion to the Church that Pope Francis has praised the integrity and loyalty of the

Knights of Columbus and "express[ed]" his "gratitude for the unfailing support" the Knights of Columbus "has always given to the works of the Holy See." *The Pope Praises the Integrity and Loyalty of the Knights of Columbus*, HOLY SEE PRESS OFFICE – VATICAN INFORMATION SERVICE (Oct. 10, 2013), http://visnews-en.blogspot.com/2013/10/the-pope-praises-integrityand-loyalty.html (last visited Jan. 21, 2014).

Members of the Knights of Columbus must be practicing Catholics. The Knights of Columbus further requires its Board of Directors and senior leadership to be members, and hence practicing Catholics, and the organization includes its Supreme Chaplain—currently a Catholic Archbishop—on its Board of Directors and Executive and Finance Committee. The Knights of Columbus employs a full-time priest at its headquarters and offers daily Mass for its employees. And a Catholic priest serves as chaplain to each of the Knights of Columbus' more than 14,000 councils.

The religious faith of the Knights of Columbus inspires the organization to provide aid to those in need—Catholics and non-Catholics alike. Providing donations directly and through its affiliated charitable entity, Knights of Columbus Charities, Inc., the Knights of Columbus supports a variety of national and international charitable initiatives. Examples include helping orphans in Africa, providing artificial limbs for children in Haiti, assisting victims of natural disasters, offering housing and other assistance to women experiencing crisis pregnancies, and supporting the Special Olympics. In addition, Knights of Columbus councils around the United States and abroad regularly

provide direct service to their communities, such as restocking shelves at local food pantries, providing new coats to underprivileged children during the winter, and assisting persons with intellectual disabilities. Many of the organization's other charitable activities are directed to religious causes, such as supporting the Sisters of Life, a community of women religious dedicated to the protection and enhancement of human life.[2]

2. The Knights of Columbus conducts its religious, fraternal, and charitable activities in a manner that is consistent with its Catholic mission and identity. Indeed, the Charter for the Knights of Columbus requires the organization to act "always consistent with Catholic values and doctrine." See Charter of the Knights of Columbus § 2 (2013). This includes the Church's teachings on the sanctity of human life, including the Church's belief that contraception and abortion are intrinsically immoral. See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2258, 2270–75, 2284–87, 2366, 2370, 2399 (2d ed. 1997); see also Pope John Paul II, *Evangelium Vitae* ¶¶ 58–62 (1995), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jpii_enc_25031995_evangelium-vitae_en.html; KAROL WOJTYLA, LOVE AND RESPONSIBILITY (1981); Pope Paul VI, *Humanae Vitae* (1968), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals

---

[2] Beyond extending significant financial support to the Sisters of Life, the Knights of Columbus owns the Villa Maria Guadalupe Retreat Center in Stamford, Connecticut, at which the Sisters of Life host retreats, educational opportunities, seminars, and weekend programs that draw from the teachings of the Catholic Church.

/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html. It also includes the Church's instruction that Catholics must strive not only to avoid intrinsically immoral activities themselves, but also to avoid directly or indirectly encouraging others to engage in such activities. See CATECHISM OF THE CATHOLIC CHURCH ¶ 2287 (defining sin of "scandal": "Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged").

For example, in order to remain true to its religious principles, the Knights of Columbus will not invest its assets in any company that directly profits from activities contrary to Catholic teaching, such as embryonic stem cell research, contraception, abortion, and pornography, willingly forgoing profit opportunities. The Catholic position on the use of contraception, abortion, and the sin of encouraging and facilitating others in employing such practices is further reflected in the health insurance policies that the Knights of Columbus offers to its employees. Only services consistent with Catholic teaching are included in the plans. Accordingly, those plans do not include coverage for contraception, abortion-inducing drugs and devices, surgical abortion, sterilization, or fertilization treatment.

II. The Mandate.

While, based on their religious beliefs, the Knights of Columbus and numerous other Catholic and non-Catholic organizations and businesses have arranged their health insurance policies to exclude or limit, *inter alia*, contraceptive and abortifacient coverage, since 2010 the United States government

has sought to override those religious objections and force such coverage on such organizations.

The Act and its implementing regulations force non-exempt group health plans to cover "preventive care and screenings" without requiring co-payments, deductibles, or co-insurance from plan participants. See 42 U.S.C. § 300gg-13(a)(1)–(4). This includes the Mandate, which applies to "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." See Health Resources and Services Administration, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womens_guidelines (last visited Jan. 21, 2014); 42 U.S.C. § 300gg-13(a)(4) (defining "preventive care and screenings" as provided in Health Resources and Services Administration guidelines); 45 C.F.R. § 147.130(a)(iv) (same).

The government has exempted certain entities from the Mandate. For example, in an incomplete effort to address the serious concerns of religious groups, "religious employers" are excused from the Mandate. See 45 C.F.R. § 147.131(a). A "religious employer" is one that is "organized and operates as a nonprofit entity" and meets the Internal Revenue Code's definition of "churches, their integrated auxiliaries, and conventions or associations of churches" as well as organizations furthering "the exclusively religious activities of any religious order." *Ibid.*[3]

---

[3] Religious groups that oppose medical care or insurance as a whole may also be exempt from the entirety of the Act and thus

The government also has announced the availability of an entirely inadequate "accommodation" for eligible, non-exempt faith-based corporations, relieving such organizations that accept the "accommodation" of a duty to directly contract or pay for contraceptive services. See *id.* § 147.131(c)(2). To qualify for the "accommodation," an organization must meet each of the following eligibility requirements:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

---

would also avoid the Mandate. See 26 U.S.C. §§ 5000A(d)(2)(A), (B). Further, businesses employing fewer than 50 individuals are exempt from compliance with any of the provisions of the Act. See 26 U.S.C. § 4980H(c)(2).

Id. § 147.131(b). Upon receipt of a valid self-certification, the corporation's insurance issuer or plan administrator will provide or arrange for payments for contraceptive services. *Id.* § 147.131(c)(2).

Both the regulation's exemption and accommodation require that a faith-based entity be incorporated and operate as a non-profit in order to avoid the Mandate. Large faith-based corporations that do not qualify for non-profit status under Federal tax law, like Hobby Lobby Stores, Inc., Mardel Christian, and Conestoga Wood Specialties Corp., are offered no relief from the provisions of the Act.

SUMMARY OF ARGUMENT

The crux of the government's argument is that for-profit corporations are incapable of exercising religion and are excluded from the free exercise protections of RFRA. This is not the law.

RFRA makes no distinction—in either its text or its context—between natural persons (individuals) and other persons (including corporations), much less between for-profit and non-profit entities. And for good reason. Incorporated organizations, including churches, religious schools, and other faith-based entities, have long been able to assert claims regarding an infringement of their free exercise of religion. This Court also long has entertained the free exercise claims of sole proprietors engaged in commercial enterprise. The government has marshaled no convincing reason why First Amendment and RFRA protections evaporate for an

entity that is both incorporated *and* operated for-profit.

Potential challenges in evaluating the sincerity of religious exercise in the corporate context do not necessitate stripping all corporations of their free exercise rights. While the evidence pertinent to the sincerity analysis will sometimes be different from that used in determining the sincerity of an individual's religious beliefs, courts are already well-acquainted with appraising the genuineness of free exercise claims and motivations for corporate action. And there are readily ascertainable evidentiary markers of the sincerity of a corporation's religious exercise, including corporate governance documents, testimony from corporate owners and officers, and the manner in which the entity conducts its day-to-day operations.

Finally, the government's position could lead to a radical restricting of religious rights. If, as the government asserts, RFRA protects only those incorporated entities that successfully mounted free exercise challenges before adoption of the statute, the only corporations that can truly exercise religion are incorporated religious denominations. The vast majority of faith-based corporations, for-profit and non-profit alike, would potentially lack protection for their sincere religious beliefs under RFRA. This would include for-profit corporations engaged in well-accepted religious exercises such as kosher butchers, halal restaurants, and Christian bookstores, as well as many faith-based, non-profit entities.

ARGUMENT

I. Corporations May Pursue Free Exercise Claims Under RFRA.

The government acknowledges—as it must—that both RFRA and the Free Exercise Clause protect certain incorporated entities, such as churches. So the government must find some distinction between the incorporated plaintiffs in this case and, say, the incorporated Church of the Lukumi Babalu Aye, Inc., plaintiff in one of this Court's most significant free exercise cases before RFRA. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). The government seeks to draw a bright line between *for-profit* corporations and "religious non-profits," but that distinction has no basis, either in the text of RFRA or in congressional intent to adopt pre-RFRA free exercise doctrine. Nor does it make any sense.

1. Congress enacted RFRA in the wake of *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872 (1990), to "restore" strict-scrutiny review of facially-neutral laws that burden religious exercise. 42 U.S.C. § 2000bb(b)(1). RFRA provides that the government may not "substantially burden a person's exercise of religion" unless it shows that the action causing the burden:

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb–1.

On its face, RFRA contains no definition of "person," and therefore the definition of "person" found in the Dictionary Act, 1 U.S.C. § 1, should be used. The Dictionary Act explicitly defines "person" to "include corporations," and does not distinguish between natural or artificial "persons," or between artificial "persons" that are for-profit or non-profit entities. *Ibid.* If Congress had intended to depart from that standard definition of "person" in RFRA and reserve RFRA's protections only to natural persons, it could easily have done so. See, *e.g.*, 46 U.S.C. § 104 (defining citizens of United States as being "natural persons"); 15 U.S.C. § 1692a (defining "consumer" for purposes of Fair Debt Collection Practices Act as "natural person"). In addition, Congress clearly knows how to specify a protection that extends only to particular faith-based entities. See, *e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (exempting "a religious corporation, association, educational institution, or society" from prohibitions against employment discrimination on basis of religion).

There is nothing facially absurd with including corporations among the "persons" protected by RFRA. Not even the government disputes that RFRA would apply to an incorporated church. The Knights of Columbus provides an excellent example of another kind of entity that has incorporated religion into its very fabric, practices that religion in its everyday operations, and also advances the individual religious practice of its members. A core mission of the Knights of Columbus is to "unite members in their Catholic identity and the practice of their Catholic faith." See Charter of the Knights of Columbus § 2. While the Knights of Columbus

itself may not "pray, worship, [or] observe sacraments," *Conestoga Wood Specialties Corp.* v. *Sebelius*, 724 F.3d 377, 385 (3d Cir. 2013), it employs a full-time priest at its headquarters and offers daily Mass for its employees at an on-site chapel, and has a priest serve as chaplain to each of its thousands of councils. To promulgate the faith and Catholic teachings, the Knights of Columbus has established and operates the Blessed John Paul II Shrine in Washington, D.C., and sponsors the Pontifical John Paul II Institute for Studies on Marriage and Family at The Catholic University of America. It also provides charitable support to Catholic religious orders and charities, such as the Sisters of Life. Even while investing its assets, the Knights of Columbus practices religion, including by declining to invest in companies that profit from conduct inconsistent with Catholic values.

2. The government's principal argument for departing from the Dictionary Act's definition of person is that this is one of those rare cases in which the "context" of a word requires departure from the Dictionary Act's standard definition. In particular, the government's logic is that RFRA was intended to legislatively overturn *Smith*; pre-*Smith* free exercise jurisprudence thus provides the "context" within which to understand RFRA's use of "person"; and, as no pre-*Smith* case afforded a for-profit corporation relief from a facially-neutral law on the basis of religion, Congress could not have intended to extend protections under RFRA to corporations either. See Pet'r Br. at 13–17.

That argument tortures the Dictionary Act's use of "context" beyond recognition. Under the

Dictionary Act, "context" only requires abandonment of the Dictionary Act's definition of a word when "the text of the Act of Congress surrounding the word at issue" results in that definition being a "square peg" that does not fit into the statute's "round hole." *Rowland* v. *Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199–200 (1993). In *United States* v. *Middleton*, 231 F.3d 1207 (9th Cir. 2000), for example, the Ninth Circuit disregarded the Dictionary Act and interpreted the undefined term "individuals" in 18 U.S.C. § 1030(e)(8)(a) to include artificial persons. *Id.* at 1211. Although "the Dictionary Act's definition of 'person' implies that the words 'corporation' and 'individuals' refers to different things," the Ninth Circuit concluded that, when viewed "in context," it was evident that "Congress used 'individuals' and 'person' in a non-technical manner" in the statute "without reference to the Dictionary Act." *Ibid.*

The Dictionary Act's definition of person is not a "square peg" within the "context" of RFRA. Congress's expressly stated purposes in enacting the law were only two-fold: "to restore the compelling interest test as set forth" in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(1), (2). Congress observed that "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interest"; that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise"; and that "governments should not

substantially burden religious exercise without compelling justification." *Id.* § 2000(bb)(a)(2), (3), (5). There is nothing in that text, or in RFRA's operative provisions, suggesting that recognizing free exercise claims by corporations would be inconsistent with Congressional intent or the structure of RFRA. See *Korte* v. *Sebelius*, 735 F.3d 654, 674–76 (7th Cir. 2013); 13-354 Pet. App. 24a–32a.

RFRA's "context," if anything, suggests an intent to protect free exercise expansively, in a manner that an unnecessarily cramped reading of "person" would defeat. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." (emphasis added)). Religious endeavors often involve and sometimes require the combined action of many individuals. And the adoption of the corporate form may often be essential to the organization's ability to engage in that religious exercise: charitable missions requiring long-term continuity and oversight; schools providing religious instruction; even churches incorporated to secure their assets and to protect their members from liability. The individual members of the Knights of Columbus, for example, would not be able to promulgate the faith nearly as effectively individually as they do together as a group—few individuals can sponsor and operate a Shrine singlehandedly.

To be sure, as the government stresses, there were no pre-*Smith* cases ultimately holding in favor

of a for-profit corporation on free exercise grounds. But there were no cases holding that for-profit corporations lack any free exercise rights either. Indeed, the plurality in *Gallagher* v. *Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961) (plurality opinion), believed that the question remained open, and the other five Justices in that case—Brennan, Stewart, Frankfurter, Harlan, and Douglas—concluded that the kosher corporation at issue did possess free exercise rights. See *id.* at 641 (noting that Justices Brennan and Stewart dissent and "are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion"); *McGowan* v. *Maryland*, 366 U.S. 420, 512–22 (1961) (Frankfurter & Harlan, JJ., concurring); *id.* at 576–78 (Douglas, J., dissenting).

Even if the government is correct that the question remains open, while Congress's intent in enacting RFRA was to "*restore*" pre-*Smith* jurisprudence, there is no indication that Congress intended to *freeze* that jurisprudence, leaving questions previously unaddressed and unresolved open for all eternity—or, as the government proposes here, necessarily resolving such questions against the party claiming free exercise rights. The government's proposal to freeze pre-*Smith* jurisprudence for purposes of RFRA is entirely unworkable; under it, no matter whether this Court continues to refine free exercise jurisprudence for purposes of the First Amendment, as in recent cases such as *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012), such developments must be ignored for purposes of RFRA. Yet the government has identified no justification for

ignoring such refinements when they are not inconsistent with Congress's purposes in enacting RFRA.

3. While the government ultimately seems to argue that no organization, other than a religious denomination, has any free exercise rights, see 13-354 Pet'r Br. at 13, 15–17, at times it casts its argument as involving a dichotomy between "non-profit" entities focused on religion and "for-profit" entities focused on profit. *E.g.*, *id.* at 19 ("For-profit corporations 'are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate a religious values-based mission.'" (quoting *Gilardi* v. *U.S. Dep't of HHS*, 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part))). Such a rigid dichotomy has no basis in law or fact and should be rejected.

That an organization is classified as non-profit does not make its beliefs any more sincere, nor would a loss of such status somehow mean a loss of faith. See Mark L. Rienzi, *God & the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 63 (2013) ("The fact that the organization urging the public to accept Jesus Christ as Lord and Savior also generates profits does not make the evangelization any less an exercise of religion."). To argue otherwise would elevate the form of a corporation for purposes of federal and state tax law over the substance of its beliefs. See Steven J. Willis, *Corporations, Taxes, & Religion: The Hobby Lobby & Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1, 61–62 (2013) ("[T]he categories for-profit and not-for-profit are merely state law creations with

labels only loosely related to financial or economic reality. Nothing in the typical state not-for-profit act requires not-for-profit entities to suffer losses, and nothing penalizes them for making profits. Thus, the label is one of convenience, at most, and not one of substance."). To qualify as a tax-exempt non-profit corporation under § 501(c)(3), for example, a faith-based organization must comply with myriad requirements unrelated to its religious views.

4. The government argues, in reliance on background principles of corporate law, that corporations and individuals are distinct, and the religious beliefs of individuals should not be imputed to the corporation which they own. See Pet'r Br. at 23–26. The Knights of Columbus agrees with Hobby Lobby, Mardel Christian, Conestoga Wood, and many lower courts that the government's position on this point is incorrect. See, *e.g.*, *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (relying on corporation's right "to assert the free exercise rights of its owners"); see also *Tyndale House Publishers, Inc.* v. *Sebelius*, 904 F. Supp. 2d 106, 116–17 (D.D.C. 2012) (allowing corporation to assert claims based on religious views of its owners and operators); 13-354 Pet. App. 38a ("[W]e cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the same activities as before."); *Korte*, 735 F.3d at 682 n.17 (acknowledging free exercise rights under RFRA for closely-held corporations and stating that controlling shareholders of those corporations were "in a position to operate their businesses in a manner that conforms to their religious commitments").

Even conceding the point, it remains the case that a corporation can adopt a religious identity and exercise religion separate and apart from its owners. Although the government argued in the Tenth Circuit that "[f]or-profit corporate entities . . . do not—and cannot—legally claim a right to exercise or establish a 'corporate' religion under the First Amendment or the RFRA," Gov't C.A. Br. at 12, 22, No. 12-6294 (10th Cir. Mar. 15, 2013), the government offered no analysis of why this might be so. Nor could it, for a flat rule against corporate religion flies in the face of experience.

As an initial matter, closely-held and family-owned companies are not the only incorporated entities that practice religion. Catholic hospitals and universities, for example, often state their missions in terms of their religious obligations to perform acts of charity, to promulgate the faith, or to glorify God. *E.g., Mission Statement of Belmont Abbey College*, http://belmontabbeycollege.edu/about/mission-vision-2/ (last visited Jan. 27, 2014) ("Our mission is to educate students in the liberal arts and sciences so that in all things God may be glorified . . . . As a Benedictine institution, we find this glory especially revealed in the development of the whole person, guided by the liberal arts, as a responsible steward of the true, the beautiful, and the good."). Such institutions with a religious mission will frequently have some trustees, directors, and employees who do not necessarily share the religion advanced by the organization. So long as such persons support the *organizational* religious mission, however, that a substantial number—even a majority—of board members or professors at any given time happen to be members of different faiths should be irrelevant.

Even for-profit enterprises can express *corporate* goals and beliefs beyond the mere maximization of shareholder value. See *Theodora Holding Corp.* v. *Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969) (endorsing for-profit corporation's donations "of a charitable or educational nature"); *A. P. Smith Mfg. Co.* v. *Barlow*, 98 A.2d 581, 590 (N.J. 1953) (noting that corporations may aid "the public welfare and advance the interests of the plaintiff as a private corporation and as part of the community in which it operates"); see also *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 794–95, 794 n.34 (1978). There are, in fact, many examples of for-profit enterprises that are incorporated to further a religious aim or goal. See Rienzi, *supra*, at 74–75 (identifying kosher coffee shop in Brooklyn, New York—Rio Gas Station and Heimeshe Coffee Shop—and halal grocery store in Minneapolis, Minnesota—Afrik Grocery, Inc.—as examples of for-profit corporations that engage in religious exercise). As one example, the for-profit company Zondervan, publishers of the New International Version of the Bible and former owners of the for-profit Christian bookstore chain Family Christian Stores, Inc., was specifically established with the intention "to deliver Christian content and resources that exalt God and see humanity in its proper perspective in relation to God as revealed in the Bible." *Zondervan Mission, Values and Publishing Philosophy*, http://zondervan.com/about/mission (last visited Jan. 21, 2014).

Organizations of that nature, much like Catholic educational institutions or Catholic hospitals, have religious missions that are institutional, not keyed to any individual or group of individuals. With respect to such religious-affiliated and themed institutions,

the owners are not the only stakeholders; in many cases, students, customers, employees, and others outside the ownership structure may have a substantial stake in the ability of the organization to facilitate and advance their practice of religion and religious aspirations. The government is therefore simply incorrect to necessarily equate *corporate* religious dedication with the religious devotion of a few controlling shareholders. While the religious beliefs of a corporation's owners can be relevant—and in some cases, such as a small, closely-held corporation, the best—evidence in a RFRA case, see *infra* Section II, it is not the case that free exercise rights of a corporation are always derivative of the personal religious beliefs of the corporation's owners.

II. There Are Demonstrable Guideposts To Evaluate Whether A Corporation Is Engaged In Sincere Religious Exercise.

The government has expressed concern that affording free exercise rights to for-profit corporations could lead to difficulty in evaluating the sincerity of an entity's religious exercise. See 13-354 Pet. App. 42a. Chief Judge Briscoe echoed those feelings in her dissenting opinion in the proceedings below:

> [T]he majority's holding threatens to entangle the government in the impermissible business of determining whether for-profit corporations are sufficiently 'religious' to be entitled to protection under RFRA from a vast array of federal legislation.

Id. at 129a (Briscoe, C.J., concurring in part and dissenting in part).

Such concern is unwarranted. There are readily-ascertainable evidentiary guideposts in the corporate setting that can be used, on a case-by-case basis, to determine the sincerity of a corporation's religious exercise.

To begin, a corporation can establish the sincerity of its religious exercise by offering testimony or affidavits from its owners. Courts, in fact, often prefer this type of evidence in conducting a sincerity analysis, finding that it best reflects the true motivations of the actor pursuing relief on the basis of religious belief. See *Patrick* v. *LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (stating that assessment of individual's sincerity "demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-examination"). This type of evidence is particularly relevant in the case of a closely-held corporation or a publicly-traded entity with a control block, as a court could evaluate the sincerity of the individuals who principally control the activities of the company. See Willis, *supra*, at 72 ("[O]ne can easily imagine a corporation with three or four closely related shareholders being operated—at least in the eyes of the owners—'for' religious purposes. Thus, the number of shareholders and how they are related is arguably among the most significant of factors."). Shareholder votes and shareholder-sponsored activities could also evidence the sincerity of the entity's religious exercise.

Closely-held corporations are not the only organizations that practice religion, however, and

other types of corporations can establish the sincerity of their religious beliefs through other means. A corporation also can prove its sincerity by means of its charter, articles of incorporation, bylaws, or mission statement. Courts routinely look to those kinds of governance materials in other settings "to determine the purpose for which a corporation was created." See 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 139 (perm. ed. rev. vol. 2010); see also *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (stating that evidence of religious affiliation included by-laws that defined corporation as religious and charitable and that "declare[d] that [corporation's] mission is to provide elder care to 'aged of the Jewish faith in accordance with the precepts of Jewish law and customs.'"); *Tyndale House Publishers, Inc.*, 904 F. Supp. 2d at 116 (finding corporate charter relevant to whether corporation maintains "faith-oriented mission"). That is precisely the approach the Tenth Circuit took here, pointing to the commitment in Hobby Lobby's written statement of purpose to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." 13-354 Pet. App. 8a. Based on that and other evidence, the government has raised no serious challenge to the sincerity of Hobby Lobby's religious beliefs.

Finally, a corporation may establish its sincere exercise of religion by pointing to the manner in which it conducts its day-to-day operations. See *Shaliehsabou*, 363 F.3d at 310–11 (describing how Jewish hospice "maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on every

resident's doorpost"); see also Rienzi, *supra*, at 109–14. Such evidence could be found in the organization's employee manuals, handbooks, and contracts (*e.g.*, codes of conduct or work attire requirements), in the organization's hours of operation (*e.g.*, observation of the Sabbath or religious holidays), and in the clientele or customers to whom the organization markets its business (*e.g.*, a Christian book store or kosher deli). In the case of Hobby Lobby, for example, the Tenth Circuit appropriately considered the company's practices such as not doing business with alcohol distributors and its purchase of full-page newspaper advertisements communicating a religious message. See 13-354 Pet. App. 8a.

At bottom, affording free exercise rights to incorporated entities may indeed present certain challenges to courts in evaluating the sincerity of religious exercise. But those challenges are not insurmountable and definitive evidentiary guideposts exist to assist a court in this subjective analysis. Nor is there significant risk of a corporation—comprised often of many people with intimate knowledge of the true purpose for a given business activity—succeeding in falsely claiming religious exercise. In the judiciary's two decades of experience with RFRA, it has not faced a wave of insincere free exercise challenges by individuals. See *Moussazadeh* v. *Tex. Dep't of Crim. Justice*, 703 F.3d 781, 791 (5th Cir. 2012) ("the sincerity of a religious belief is not often challenged" and "is generally presumed or easily established"). There is no reason to think that acknowledging the free exercise rights of corporations will trigger a wave of insincere RFRA claims. And, even if there were such a risk, RFRA

provides a safety valve to the government to enforce narrowly-tailored laws that further a compelling government interest—no matter the sincerity of a corporation's religious exercise.[4]

As one court aptly noted when conducting a sincerity analysis:

> [W]hile courts may be poorly equipped to determine what is religious, *they are seasoned appraisers of the 'motivations' of parties* and have a duty to determine whether what is professed to be religion is being asserted in good faith.

United States v. *Manneh*, 645 F. Supp. 2d 98, 112 (E.D.N.Y. 2008) (emphasis added) (rejecting RFRA claim where plaintiff seeking relief did not hold sincere religious belief). The task for a court is thus no different whether the "person" engaging in religious exercise is an individual or a corporation; only the breadth and type of evidence relevant to establishing sincerity will change. The government's concern is unfounded, and it provides no basis on

---

[4] The Knights of Columbus fully supports the arguments by Hobby Lobby, Mardel Christian, and Conestoga Wood that the Mandate should not survive review under RFRA. The Knights of Columbus does not believe that there is a "compelling government interest" in facilitating access to contraception and abortifacients, and even if there was, requiring religiously-motivated employers to facilitate that access through employer-provided health plans is not the least restrictive means to serve it. Given the breadth of the government's authority to tax and spend, see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 25 (1981), and its existing vast involvement in the provision of health care services, the government could just as easily address its interests through social welfare programs, the provision of tax credits, and so forth.

which to strip corporations of their free exercise rights under RFRA.[5]

III. The Government's Position Would Have Profound Implications On The Future Of Free Exercise Jurisprudence.

The government's position in this case, while presented in the narrow context of the Mandate, would broadly undermine the future of free exercise jurisprudence if adopted by this Court.

When stripped of its veneer, the government's true position comes into focus. In effect, the government is advocating for unfettered discretion to ignore religious exercise of any form so long as it is regulating an incorporated entity that is not a church, synagogue, or other house of worship. Indeed, as it acknowledged in a related case, the government views the exemption and inadequate

---

[5] In her dissent, Chief Judge Briscoe further lamented that the majority opinion will "transcend the provision of coverage for contraception" and open "the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs." 13-354 Pet. App. 128a–29a. Chief Judge Briscoe noted, for instance, that "Catholic-owned corporations could deprive their employees of coverage for end-of-life hospice care and for medically necessary hysterectomies," and that "corporations owned by certain Muslims, Jews, or Hindus could refuse to provide coverage for medications or medical devices that contain porcine or bovine products." *Ibid.* Putting aside the fact that Chief Judge Briscoe repeatedly mischaracterizes Catholic teachings on certain medical treatments, the Knights of Columbus is aware of no such challenges to facially-neutral laws having arisen under RFRA or in any of the nearly two dozen states that have enacted their own version of RFRA. And, even if such challenges were to arise, they would again remain subject to strict-scrutiny review under RFRA and its compelling-interest safety valve for the government.

accommodation to the Mandate *for non-profits* not as necessary to comply with RFRA but as voluntary acts of kindness to faith-based organizations:

> When the contraceptive-coverage requirement was first established, in August 2011, certain non-profit religious organizations . . . objected on religious grounds to having to provide contraceptive coverage in the group health plans they offer to their employees. *Although, in the government's view, these organizations were mistaken to claim that an accommodation was required under the First Amendment or the Religious Freedom Restoration Act (RFRA), the defendant Departments decided to accommodate the concerns expressed by these organizations.*

See Gov't Br. at 1, *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, Case No. 1:12-cv-2542, Doc. No. 79 (E.D.N.Y. Sept. 11, 2013) (emphasis added).

The potential implications of the government's position are as startling as they are far-reaching. Without any showing of a compelling government interest or narrow tailoring, the government could issue regulations requiring group health plans to cover elective third-trimester abortions where such are legal. The government also could enact laws that force a kosher deli or other for-profit Jewish restaurant to ignore kosher dietary restrictions or force a for-profit Muslim restaurant to ignore halal dietary restrictions. See, *e.g.*, 13-354 Pet. App. 39a (noting "connection between the exercise of religion

and the pursuit of profit" and questioning whether "an incorporated kosher butcher [would] really have no claim to challenge a regulation mandating non-kosher butchering practices"); *Korte*, 735 F.3d at 681 ("On the government's understanding of religious liberty, a Jewish restaurant operating for profit could be denied the right to observe Kosher dietary restrictions. That cannot be right."). Such rules would destroy the fabric and raison d'etre of those for-profit corporations, yet the corporations would have no avenue to object on free exercise grounds under RFRA.

The government's position that religious practices undertaken for years by businesses and other entities can be cast aside without legal recourse under RFRA finds no basis in the text of RFRA, in logic, or in experience. See, *e.g.*, *Korte*, 735 F.3d at 681 ("At bottom, the government's argument is premised on a far-too-narrow view of religious freedom: Religious exercise is protected in the home and the house of worship but not beyond. Religious people do not practice their faith in that compartmentalized way; free-exercise rights are not so circumscribed."). It certainly cannot be what Congress intended when it enacted RFRA, and therefore should be rejected by this Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals in *Hobby Lobby* and reverse the judgment of the court of appeals in *Conestoga Wood*.

Respectfully submitted.

WILLIAM M. JAY
SHAUNEEN GARRAHAN
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001

JOHN A. MARRELLA
KNIGHTS OF COLUMBUS
One Columbus Plaza
New Haven, CT 06510

KEVIN P. MARTIN
Counsel of Record
JOSEPH P. ROCKERS
TODD MARABELLA
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
kmartin@goodwinprocter.com
(617) 570-1000

Counsel for Amicus Curiae

January 28, 2014